

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
National Cable and Telecommunications Association)	WC Docket No. WC 11-118
)	
Petitions Regarding Section 652)	
Of the Communications Act)	
)	

**REPLY COMMENTS OF
THE AMERICAN CABLE ASSOCIATION**

Introduction

The American Cable Association (“ACA”)¹, by its attorneys, respectfully submits these reply comments in response to the Commission’s public notice regarding the petition for declaratory ruling (“PDR”) and the conditional petition for forbearance (“Forbearance Petition,” with the PDR, the “Petitions”) of the National Cable and Telecommunications Association (“NCTA”).² In the Petitions, NCTA seeks to prevent or limit the application of Section 652 of the Communications Act, as amended (the “Act”), to mergers and acquisitions between cable operators and competitive local exchange carriers (“CLECs”).

The comments filed thus far in this proceeding convincingly demonstrate that mergers and acquisitions between cable companies and CLECs serve the public interest and are consistent with the intent of Congress in adopting Section 652. Furthermore, the comments

¹ ACA is a trade organization representing nearly 900 smaller and medium-sized, independent cable companies who provide broadband services for more than 7.6 million cable subscribers primarily located in rural and smaller suburban markets across America. Accordingly, ACA has a direct and vital interest in this proceeding.

² *Comment Sought on NCTA Petitions Regarding Section 652 of the Communications Act, Pleading Cycle Established*, Docket No. WC 11-118, Public Notice DA 11-1177, rel. July 8, 2011.

confirm that the Petitions satisfy the applicable legal criteria for grant. As such, the Commission should grant NCTA's requested relief.

The Comments Demonstrate That the Public Interest Would Be Served by Grant of the Petitions.

As ACA explained in its Comments, restricting the applicability of Section 652 as proposed by NCTA would serve the public interest. Commenters overwhelmingly agree with ACA on this point.³ Cable companies and CLECs have complementary capabilities: cable operators have typically focused on the consumer/residential market, where they most often provide the triple-play of video, voice, and broadband services, while CLECs have traditionally focused on providing telecommunications services to business customers in competition to dominant incumbent local exchange carriers ("ILECs"). Because of their complementary capabilities, alliances between cable companies and CLECs can promote greater facilities-based competition with ILECs and other providers, and thus encourage lower rates, higher quality, and more innovative service offerings. There is very little likelihood of antitrust concerns with such arrangements because, in addition to serving different customer segments, both cable companies and CLECs are non-dominant providers of local telecommunications services.⁴

³ See, e.g., Comments of Citizens Against Government Waste, WC Docket No. 11-118, Aug. 22, 2011 ("CAGW Comments"); Comments of Comcast Corporation, WC Docket No. 11-118, Aug. 22, 2011 ("Comcast Comments"); Comments of COMPTTEL, WC Docket No. 11-118, Aug. 22, 2011 ("COMPTTEL Comments"); Comments of Digital Liberty, WC Docket No. 11-118, Aug. 22, 2011 ("Digital Liberty Comments"); Comments of the Institute for Policy Innovation, WC Docket No. 11-118, Aug. 22, 2011 ("IPI Comments"); Comments of National Taxpayers Union, WC Docket No. 11-118, Aug. 22, 2011 ("NTU Comments"); Comments of Precursor LLC, WC Docket No. 11-118, Aug. 22, 2011 ("Precursor Comments"); Comments of U.S. TelePacific Corp., Access Point, Inc., First Communications, Inc. and Broadview Networks, Inc., WC Docket No. 11-118, Aug. 22, 2011 ("CLEC Group Comments").

⁴ Even if antitrust concerns were to arise, the Commission along with the Department of Justice and Federal Trade Commission have ample authority to review proposed cable-CLEC combinations and block or condition their approval if significant competitive harms are likely.

The comments of Comcast and COMPTTEL echo ACA's concerns that the cable-telephone buyout restrictions in Section 652 have discouraged cable-CLEC alliances.⁵ The two cable-CLEC business arrangements in which a Section 652 waiver was required – *CIMCO*⁶ and *NTELOS*⁷ – provide evidence of the costs and burdens that the application of Section 652 can impose when cable companies and CLECs (or their affiliates) desire to merge. Limiting the application of Section 652 to transactions involving ILECs and cable companies will eliminate the uncertainty created by *CIMCO* and *NTELOS* and will encourage cable company-CLEC transactions, to the ultimate benefit of American consumers and businesses.

Commenters also recognize that limiting the application of Section 652 to transactions involving ILECs and cable companies is consistent with the history and underlying purpose of this section.⁸ They further assert correctly that limiting the application of Section 652 as NCTA proposes in its Petitions will not compromise the rights of local franchise authorities ("LFAs") or other interested parties vis-à-vis CLEC-cable company mergers, because such transactions will continue to be subject to the Commission's approval processes for transfers of control and assignment of assets, as well as the approval processes of other federal and state agencies.⁹

⁵ See Comcast Comments at 7-8; COMPTTEL Comments at 8-10.

⁶ *Applications Filed For the Acquisition of Certain Assets of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC, Memorandum Opinion and Order and Order on Reconsiderations*, WC Docket No. 09-183, 25 FCC Rcd 3401 (2010) ("*CIMCO*").

⁷ *Applications Granted For the Transfer of Control of FiberNet from One Communications Corp. to NTELOS Inc.*, WC Docket No. 10-158, Public Notice DA 10-2252, rel. Nov. 29, 2010 ("*NTELOS*").

⁸ See, e.g., CAGW Comments at 1; CLEC Group Comments at 4-5; Comcast Comments at 3-4; NTU Comments at 2.

⁹ CLEC Group Comments at 6; IPI Comments at 3.

Despite Assertions to the Contrary, the Petitions Satisfy the Applicable Legal Criteria For Grant.

Several commenters argue that the Commission cannot grant the Petitions because they do not satisfy the applicable legal standards for grant.¹⁰ None of these arguments provide a valid basis for denying the Petitions.

NATOA contends that the Commission cannot lawfully grant the PDR because Section 652(b) of the Act is not ambiguous and needs no clarification.¹¹ In making this argument, NATOA ignores Section 652(a) and the ambiguity that is inherent in Section 652 as a whole. As ACA explained in its comments, the ambiguity in Section 652 becomes apparent when Section 652(b) (restricting cable operators from acquiring LECs that provide service in the cable operator's franchise areas) is read together with Section 652(a) (prohibiting LECs from acquiring cable operators in their service territory). As a result of the differences in these provisions – in conjunction with the specific and limited definition of “telephone service area” in Section 652(e), which excludes most CLECs -- the legality of a merger between a cable operator and an overlapping LEC under Section 652 is dependent on the structure of the deal (*i.e.*, LEC buys cable operator – OK; cable operator buys LEC – not OK), even though the deal's structure has no bearing on the impact of the transaction on facilities-based competition in the areas of overlap. Under these circumstances, the Commission clearly has broad discretion to issue a declaratory ruling and eliminate this uncertainty.

¹⁰ See Comments of National Association of Telecommunications Officers and Advisors, WC Docket No. 11-118, Aug. 22, 2011 (“NATOA Comments”); Comments of National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, WC Docket No. 11-118, Aug. 22, 2011 (“Consumer Advocates Comments”); Comments of Public Knowledge, WC Docket No. 11-118, Aug. 22, 2011 (“Public Knowledge Comments”).

¹¹ NATOA Comments at 2-4.

Similarly, NATOA, Public Knowledge, and Consumer Advocates argue unsuccessfully that the Commission cannot lawfully grant the Forbearance Petition. Public Knowledge contends that the Commission can exercise its forbearance authority only within the confines of Title II regulations and services.¹² This argument ignores the plain language in Section 10, which directs the FCC to forbear from applying “*any regulation or any provision of this chapter*” to a telecommunications carrier, service, or class of carriers or services.¹³ NATOA suggests that the Forbearance Petition cannot be granted because the Commission cannot negate the rights of third parties – the LFAs – in exercising its forbearance authority.¹⁴ However, the language of Section 10 is not as restrictive as NATOA suggests. Nothing in Section 10 limits the right of the FCC to exercise its forbearance authority when such exercise would eliminate or adversely affect the rights of others. Indeed, the Commission has in other instances cut off the rights of third parties in deciding to forbear from the application of certain regulations or provisions of the Act.¹⁵

Finally, Consumer Advocates argues that cable companies are “powerful suppliers of triple-play telecommunications services” and that consumers will be inadequately protected if the FCC lessens its review of cable companies.¹⁶ As discussed above, cable-CLEC transactions will continue to be subject to the Commission’s approval processes for transfers of control and assignment of assets, as well as the approval processes of other federal and state agencies, if the

¹² Public Knowledge Comments at 2-3.

¹³ 47 U.S.C § 160(a) (emphasis supplied).

¹⁴ NATOA Comments at 5-6.

¹⁵ See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (decision to require competitive carriers to detariff eliminated rights of third parties to stop changes in carrier rates and practices by petitioning to reject or suspend carrier tariff filings).

¹⁶ Consumer Advocates Comments at 5-7.

Petitions are granted. As such, there is no reason to believe that consumers will be “inadequately protected” if the Commission restricts the applications of Section 652 as proposed in the Petitions.

Conclusion

For these reasons, the Commission should grant the Petitions and thereby determine that Section 652 of the Act does not apply to mergers and acquisitions between cable companies and CLECs.

Respectfully submitted,



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